

1 JOHN D. MUNDING
2 CRUMB & MUNDING, P.S.
3 601 W. Riverside, Suite 1950
4 Spokane, WA 99201
5 Telephone: (509) 624-6464
6 Fax: (509) 624-6155
7 Email: munding@crumb-munding.com

JUDGE WILLIAMS

8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF WASHINGTON

10 THE CATHOLIC BISHOP OF
11 SPOKANE a/k/a THE CATHOLIC
12 DIOCESE OF SPOKANE,

Debtor.

NO. 04-08822-PCW11
Chapter 11

13 COMMITTEE OF TORT LITIGANTS,

14 Plaintiff,

Adversary No. 05-80038-PCW

15 Vs.

16 THE CATHOLIC DIOCESE OF
17 SPOKANE, et al.,

Defendants.

ST. ALOYSIUS PARISH'S
OPPOSITION TO
SUMMARY JUDGMENT

19 St. Aloysius Parish and its Parishioners ("St. Aloysius"), in opposition to the Tort
20 Litigant Committee's (the "Committee") Motion for Summary Judgment (Docket Nos. 63-67,
21 72), submits the following memorandum of law. This memorandum incorporates and is
22 supported by the Affidavit of Donald Weber, Parish Administrator, the Supplemental
23 Affidavit of Fr. Daniel Barnett, and Defendants' Omnibus Statement of Facts (LR 7056). St.
24 Aloysius also adopts and incorporates those Affidavits filed by other Defendants opposing
25 Plaintiff's Motion.
26

ST. ALOYSIUS PARISH'S OPPOSITION
TO SUMMARY JUDGMENT - 1

CRUMB & MUNDING, P.S.
SUITE 1950
601 W. RIVERSIDE AVENUE
SPOKANE, WA 99201
(509) 624-6464
FAX (509) 624-6155

I.

RELIEF REQUESTED

The Committee's attempt to deny St. Aloysius its ownership interest in real property that St. Aloysius paid for, improved, and uses in fulfillment of its religious tenets must be rejected. The undisputed evidence demonstrates that:

1. Neither the Committee, its members, nor the Debtor have any beneficial interest in the real property belonging to St. Aloysius,

2. Neither the Committee, its members, nor the Debtor have a legal basis to justify the taking of real property from St. Aloysius, a non-debtor; and

3. St. Aloysius' equitable and beneficial ownership interest in the real property is clearly established by non-bankruptcy law.

As a matter of both law and fact, the Committee's Motion for Summary Judgment/Declaratory Relief seeking to deprive St. Aloysius of fundamental property rights and religious freedoms must be denied.

II.

PROCEDURAL HISTORY

A. The Bankruptcy

A voluntary petition under Chapter 11 of the Bankruptcy Code was filed by the Catholic Diocese of Spokane, a corporation sole ("Debtor"), on December 6, 2004 (Petition Date). The Bankruptcy Court entered the Order for Relief, adjudicating the Diocese a Chapter 11 Debtor. Since that date, the Debtor has acted as the Debtor-in-Possession pursuant to 11 USC 1108. The Debtor duly filed and subsequently amended its Schedules and Statement of Financial Affairs. (See Main Case Docket Nos. 19, 41-42)

Within its Statement of Financial Affairs, the Debtor describes certain real property to which it holds "bare legal title." The Statement of Affairs explains that equitable/beneficial title to such real property is held by other entities, including St. Aloysius. This description is accurate concerning the true ownership of the real property and supported by both facts and applicable law. Neither the Debtor nor St. Aloysius disputes this particular trust relationship.

1
2 **B. Appointment of Creditors Committee**

3 On February 2, 2005, the Court entered an Order duly approving the appointment of
4 the Committee. (Main Case Docket No. 206) The Committee consists of individuals who
5 filed complaints against the Diocese in the Superior Court of the County of Spokane, State
6 of Washington. Neither the Committee nor its members have asserted a claim in State
7 Court against St. Aloysius or identified any legal relationship with St. Aloysius.

8 The legal standing of the Committee to seek declaratory relief against non-debtors in
9 this manner is disputed and the subject of a pending motion to dismiss. (See Section II.F.)

10 **C. The Adversary**

11 On February 4, 2005, the Committee filed a three count Complaint ("Complaint") in
12 this adversary proceeding ("Adversary Proceeding"), specifically:

- 13 • FIRST CAUSE OF ACTION
(Declaratory Relief: The Disputed Real Property)
- 14 • SECOND CAUSE OF ACTION
(Declaratory Relief: the Disputed Personal Property)
- 15 • THIRD CAUSE OF ACTION
(Declaratory relief: Substantive Consolidation)
16 (Docket No. 1, Complaint)
17
18

19 Although property is allegedly "disputed," the Committee does not have or assert a
20 legal claim to or legal interest in the real or personal property. (See Complaint, pp. 13-15.)

21 The relief sought by the Committee is drafted as equitable, although it is clearly of
22 the nature and effect of relief determining property rights of non-debtors. Specifically,

- 23 1. Declaring that the Disputed Real Property is property of the estate under 11
24 U.S.C. § 541(a)(1) as of December 6, 2004;
- 25 2. Declaring that the Disputed Personal Property is property of the estate under
26 11 U.S.C. § 541(a)(1) as of December 6, 2004;

1 3. Ordering the Debtor to amend its Amended Statement of Financial Affairs and
2 its Amended Schedules of Assets and Liabilities to reflect that the Disputed Real Property
3 and the Disputed Personal Property are all property of the estate;

4 4. Ordering substantive consolidation, nunc pro tunc, of the Debtor's bankruptcy
5 estate with the [Diocese-Related Entities] effective as of December 6, 2004.

6 (Adv Complaint, p. 15)

7 By way of the Complaint, the Committee seeks to determine the property rights and
8 interests of not only St. Aloysius, but of 82 non-debtors. The Complaint seeks to deprive
9 those non-debtors of their instrumentalities used in religious worship, faithful exercise of its
10 mission, activities, and ministries.

11 **D. Motion for Avoidance Powers**

12 On February 7, 2004, the Committee filed a motion in the main case seeking
13 avoidance powers. (Main Case Docket Nos. 223-224) The motion was heard on May 2,
14 2005. The court continued hearing on this matter for an indefinite period (approximately 5
15 to 6 months) with any counsel being able to renote this matter on 20 days notice.
16 (Main Case Docket No. 393)

17 **E. Motion for Summary Judgment**

18 The Committee filed the present motion for summary judgment ("Motion") on April
19 17, 2005. (Adv. Docket No. 63)

20 The Motion seeks specific relief defining title and ownership of at least 22 separate
21 parcels of real property which belong to at least 22 different and distinct Defendants.
22 Although the Committee's Motion indicates that they have restricted summary judgment to
23 their first cause of action, the Memorandum aggressively seeks a ruling on their third cause
24 of action by way of an "alter ego" argument.

25 The Committee's Motion attempts to "lump" St. Aloysius' real property with other
26 Defendants' real property interests, dealing with all parcels of property collectively,
including all improvements and fixtures. However, each parcel of real property is a
separate parcel of property, with separate and distinct ownership interest, and separate

1 factual circumstances surrounding each parcel's acquisition, improvement, maintenance,
2 and use. The committee's standardized factual scenario is inapplicable and not an
3 appropriate basis for declaratory relief against St. Aloysius.

4 **F. Motion to Dismiss Adversary Proceeding**

5 On May 2, 2005, the Parish Defendants filed a motion under FRBP 7012 seeking to
6 dismiss this Adversary Proceeding on the following grounds:

7 The Committee's Complaint should be dismissed on either of two (2)
8 separate grounds.

9 1. Nothing contained within the express language of Section
10 521(1) or 541(a) clearly, explicitly, or unambiguously confers standing to a
creditors committee to file suit against non-debtors to define a non-debtor's
property rights.

11 2. The Bankruptcy Court and Federal District Court lack subject
12 matter jurisdiction over the claims alleged in the Committee's Complaint
13 because there is no case or controversy between the Committee and the
Parishes within the meaning of the Declaratory Judgment Act and Article III of
the U.S. Constitution.

14 (Docket Nos. 99-100)

15 This motion is set to be heard on June 27, 2005.

17 **III.**

18 **NON-CORE PROCEEDING**

19 The Committee asserts in its Complaint that this is a "core proceeding" under 28
20 USC § 157(b) and 1334(b). The Parishes, based upon the declaratory nature of the relief
21 sought in the Complaint, deny that this is a core proceeding. This action exclusively seeks
22 declaratory relief against over 80 non-debtor defendants to determine the property rights of
23 separate legal entities. The Complaint does not present a federal question nor is there
diversity between the litigants.

24 The present adversary action has the effect of a defacto quiet title action as to non-
25 debtor defendants. As such, it could have easily been brought in state Superior Court
26 pursuant to RCW 7.28.010 et seq., regardless of whether the Debtor was in bankruptcy.

1 For purposes of this Adversary Proceeding, St. Aloysius does not consent to entry of
2 Findings of Fact and Conclusions of Law and does not waive defenses related to Plaintiff's
3 standing and failure to state a claim. (See Docket Nos. 88, 99-100.)

4 IV.

5 STATEMENT OF FACTS

6 "I would state further that in every case I hold each Parish responsible for its
7 own obligations. Even when parish properties are held under the title of the
8 diocesan corporation, The Catholic Bishop of Spokane, (the title of nearly all
9 our parish properties) this form of tenure does not change the fact that they
10 are parish properties, the diocesan corporation being a mere non-profit
holding corporation which holds the various parish properties in trust for the
faithful of the respective parishes."

11 Most Reverend Charles D. White, Bishop of Spokane, Correspondence dated November
12 30, 1935, to Very Rev. Fitzgerald, S.J., regarding St. Aloysius Property Dispute. (See
13 Supp. Aff. of D. Barnett, ¶ 15, Ex. L)

14 St. Aloysius Parish of Spokane, Washington, was founded in 1890. St. Aloysius
15 Church is often associated in pictures as being part of Gonzaga University. Under Canon
16 Law, St. Aloysius is a separate and distinct legal entity known as a juridic person. [Canons
17 §§ 113-115, § 515] Under Civil Law, St. Aloysius is an unincorporated association.
(Committee's Statement of Undisputed Fact No. 23)

18 Presently, St. Aloysius' Christain faithful (Parishioners) consist of 1600 registered
19 member families. (Aff. of D. Weber, ¶ 9)

20 St. Aloysius' real property interests and ownership date back to the turn of the
21 century. Although the Committee's exhibits are unreadable, St. Aloysius has procured
22 historical records from the Foley Library and Parish records regarding property acquisition
23 and transfer. (Aff. of D. Weber, ¶¶ 7, 10; Aff. D. Barnett, ¶¶ 4, 5, 9) The history is
summarized as follows:

- 24 • 1900 – Block Y of Subdivision Block "A" Third Sinto Add to Spokane, Purchased
25 January 29, 1900, by Gonzaga University (Jesuits) (Supp. Aff. D. Barnett, ¶ 4)

- 1 • 1903 – Lots 11-12, Block 18, Spokane Falls, Purchased September 15, 1903, by the
2 Pioneer Educational Society (Jesuits) (Supp. Aff. D. Barnett, ¶ 5)
- 3 • 1910-1911
4 The Parish of St. Aloysius constructs the Church at St. Aloysius on property owned
5 by the Pioneer Educational Society at a cost of \$176,125.34. The Parishioners
6 borrowed the money and paid the total cost of construction. (Supp. Aff. D. Barnett, ¶
7 6; Aff. D. Weber, ¶ 7)
- 8 • May 12, 1934 – Correspondence memorializing St. Aloysius' debts, use of credit,
9 and St. Aloysius' desire to purchase the land under the church from the Jesuits.
10 (Supp. Aff. D. Barnett, ¶ 7)
- 11 • May 19, 1934 – Correspondence from Jesuits to the Bishop regarding property
12 transfer. (Supp. Aff. D. Barnett, ¶ 8)
- 13 • June 16, 1934 – Deed of property from Gonzaga University to Bishop of Spokane, a
14 corporation sole, for St. Aloysius Parish. (Supp. Aff. D. Barnett, ¶ 9)
- 15 • January 22, 1935 – Bishop to St. Aloysius, demanding payments on its debts.
16 (Supp. Aff. D. Barnett ¶ 10)
- 17 • February 14, 1935 – Letter from M.O. Malley S.J., Pastor, St. Aloysius, to Bishop: "I
18 am writing in reference to the purchase of the property by the Parish of the property
19 on which St. Aloysius Church stands . . . " (Supp. Aff. D. Barnett, ¶ 11)
- 20 • May 1, 1935 – Correspondence from Old National Bank reminding St. Aloysius of its
21 debt obligation. (Supp. Aff. D. Barnett, ¶ 12)
- 22 • May 23, 1935 – Correspondence to Pastor for St. Aloysius representing value of the
23 land to be purchased at \$3,500. (Supp. Aff. D. Barnett, ¶ 13)
- 24 • August 19, 1935 – Correspondence from Bishop of Spokane to Michael O'Malley
25 detailing parish debt, required payment, and acknowledgement, with detailed
26 property description. (Supp. Aff. D. Barnett, ¶ 14)
- November 30, 1935 – Letter from Bishop to Provincial Leader of Jesuits:
" . . . if Gonzaga University feels that to expect it to give a deed of the
lots to the parish (title, the Catholic Bishop of Spokane) . . . I would state
further that in every case I hold each parish responsible for it sown

1 obligations. Even when parish properties are held under the title of the
2 diocesan corporation, the Catholic Bishop of Spokane (the title of nearly
3 all our parish properties) this form of tenure does not change the fact
4 that they are parish properties. The diocesan corporation being a mere
non-profit holding corporation which holds the various parish properties
in trust for the faithful of the respective parishes."

5 (See Aff. D. Barnett, ¶ 15, Ex. L)

6 St. Aloysius continued to acquire and improve its real property over the next 75
7 years. All improvements and purchases were made by St. Aloysius, with loans obtained by
8 St. Aloysius, and paid for with donations, tithes, and gifts from Parishioners. (Aff. of D.
9 Weber, ¶¶ 5-10)

10 Not only has St. Aloysius paid for the property, it pays for all insurance, fees, and
improvements associated with the real property. (Aff. of D. Weber, ¶¶ 6-10)

11 Similar to other Parishes, St. Aloysius has its own tax identification number, banks in
12 the public sector, maintains its own financial records, contracts with third parties, rents
13 property, and has its own employees. All of these activities are conducted with funds
14 derived from donations of Parishioners. (Aff. of D. Weber, ¶ 6, 12)

15 St. Aloysius also rents a portion of its property to a third party. St. Aloysius receives
16 the income from these rents, which is kept as Parish income and used for Parish
17 operations. As a result of renting the property, St. Aloysius must pay real property taxes on
this portion of its real property. (Aff. D. Weber, ¶ 6)

18 The Parishioners of St. Aloysius donate and tithe to St. Aloysius with the clear
19 understanding the money given belongs to St. Aloysius for the exclusive benefit of the
20 Parish. (Aff. D. Weber, ¶¶ 10, 12)

21 Contrary to the Committee's conclusions, the facts demonstrate St. Aloysius is its
22 own legal entity and is the true owner of all equitable and beneficial interest of the real
23 property identified as "St. Aloysius" by the Committee.
24
25
26

V.

STANDARDS OF REVIEW

A. Declaratory Judgment Standard.

The Committee glosses over the fact that the relief it seeks is entirely declaratory in nature. A declaratory judgment action is ripe for adjudication only where an "actual controversy" exists. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5th Cir. 2000). "As a general rule, an actual controversy exists where 'a substantial controversy of sufficient immediacy and realty [exists] between parties having adverse legal interests.'" Id., citing Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5th Cir. 1986).

Although some Bankruptcy Courts have entertained declaratory judgment actions filed by trustees when the ownership interest of an asset was in dispute which the trustee asserted was property of the estate on the petition date, the present case is not advanced by a trustee or Debtor-in-Possession. See In re Challenge Air Int'l. Inc., 952 F.2d 384 (11th Cir. 1992); In re Taylor & Campaigne, Inc., 157 B.R. 493 (Bankr. M.D. Fla. 1993); Bottom v. Bottom, 176 B.R. 950 (Bankr. N.D. Fla. 1994); In re Ocean Beach Club, Inc., 79 B.R. 505 (Bankr. S.D. Fla. 1987).

There is no legal relationship between St. Aloysius, the Committee, or any Committee members. Furthermore, there is no legal dispute between St. Aloysius and the Debtor regarding the ownership interests in real property or trust relationship between the Debtor and St. Aloysius. It is correctly described and defined in the Debtor's Statement of Affairs in accordance with the relationship between the parties as established by Canon Law and Civil Law. As such, no actual controversy between parties with adverse legal interests exists.

B. Summary Judgment Standard.

The party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden, he is not entitled to judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 26, L.Ed.2d 142, 90 S. Ct. 1598 (1970).

1 In determining whether there are any genuine issues of material fact, the Court must
2 view the evidence in the light most favorable to the nonmoving party. Summers v. A.
3 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997). The party opposing summary
4 judgment to survive the motion need only present evidence from which a jury might return a
5 verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Id. at
6 1039, citing Anderson v. Liberty Lobby, Inc.

7 The Committee has failed to produce any evidence to support its contention that the
8 beneficial and equitable ownership of the real property does not belong to St. Aloysius.

9 However, St. Aloysius has not only produced reasonable evidence as to a material
10 issue of fact as to its ownership interest in the real property, it has also produced
11 overwhelming evidence that St. Aloysius is the true owner of the real property in question.

12 VI.

13 LEGAL ANALYSIS PREVENTING DECLARATORY RELIEF 14 CONCERNING REAL PROPERTY OWNERSHIP

15 A. Whether Applying Civil Law Or Canon Law, St. Aloysius Parish Is A 16 Separate And Distinct Legal Entity.

17 The Committee has conceded that Parishes are unincorporated associations.
18 (See, Committee Statement of Undisputed Fact No. 23) The Committee's
19 acknowledgment of St. Aloysius' status as a separate legal entity from the Debtor is
20 consistent with both Civil and Canon Law.

21 1. Washington Law Recognizes St. Aloysius As A Legal Entity.

22 The Parish, as an unincorporated association, is a separate legal entity under
23 Washington law. A Parish consists of its Christian faithful. (Canon 515(1)) The Christian
24 faithful ("Parishioners") of each Parish are the residents of their local community. They are
25 residents of cities, towns, and counties within Eastern Washington, in some cases they are
26 members of sovereign Indian tribes. The Parishioners are the epitome of a voluntary group

1 pursuing a common purpose. In the case of each parish, the common purpose is the
2 fulfillment of their religious tenets.

3 An "unincorporated association" is defined as "[a] [v]oluntary group of persons,
4 without a charter, formed by mutual consent for the purpose of promoting common
5 enterprise or prosecuting common objective. An organization composed of a body of
6 persons united with a charter for the prosecution of a common enterprise." *Black's Law*
7 *Dictionary*, 1531 (6th 1991). This is a broad definition, and Washington has recognized that
8 "associations vary in their nature." *Riss v. Angel*, 131 Wn.2d 612, 635 (1997).
9 Washington's case law recognizes a variety of forms of unincorporated associations,
10 including groups of individuals of a particular religion or creed. See *Bacon v. Gardner*, 38
11 Wn.2d 299 (1951), *Church of Christ v. Carder*, 105 Wn.2d 204 (1986).

12 Unincorporated associations clearly have the ability to hold the equitable interests of
13 a trust and defend that interest in court. *Leslie v. Midgate Center, Inc.*, 72 Wn.2d 977
14 (1967). Washington has repeatedly acknowledged the legal capacity of unincorporated
15 associations to be parties to lawsuits. *Bacon v. Gardner*, 38 Wn.2d 299, 304 (1951); *State*
16 *v. Bothell*, 89 Wn.2d 862, 866 (1978); see also *Church of Christ v. Carder*, 105 Wn.2d 204,
17 206 (1986); *Riss*, 131 Wn.2d 612 (1997). By statute, unincorporated associations have the
18 capacity to appear and represent their interests in declaratory judgment actions. *RCW §§*
19 *7.24.110 - .130* (West 2005). It is well settled law that unincorporated associations have
20 the ability to represent the interests of their members in legal actions. See, *State v. Bothell*,
21 89 Wn.2d at 866.

22 It is important to note that not a single case quoted by the Committee in support of
23 its assertion that each Parish is not a legal entity is from the state of Washington.
24 Bankruptcy Rule 7017 incorporates Rule 17(b), Fed. R. Civ. P., as follows:

25 The capacity of an individual, other than one acting in a representative
26 capacity, to sue or be sued shall be determined by the law of the individual's
domicile. The capacity of a corporation to sue or be sued shall be determined
by the law under which it was organized. In all other cases capacity to sue or
be sued shall be determined by the law of the state in which the district court
is held

1 As a matter of law, unincorporated associations can be sued under Washington law.
2 The various cases cited by the Committee have no precedential value here in Washington.
3 The Committee's argument that St. Aloysius does not have a legal existence separate from
4 the Diocese fails as a matter of law. It is also inconsistent with Committee's Statement of
5 Undisputed Fact No. 23.

6 **2. St. Aloysius Is A Separate Legal Entity Under Canon Law.**

7 The Law of the Roman Catholic Church ("Church") has been in existence since the
8 first century. Presently, the Church is governed by the 1983 Code of Canon Law. To the
9 extent the resolution of this matter requires a determination of the relationship between the
10 Debtor and St. Aloysius in their methods of governance, interaction or management,
11 compulsory deference is required to the provisions of the Code of the Canon Law which
12 govern these religious organizations under applicable law. The Supreme Court, when
13 faced with issues involving the Roman Catholic Church, has stated:

14 In the absence of fraud, collusion or arbitrariness, the decisions of proper
15 church tribunals on matters purely ecclesiastical, although affecting civil
16 rights, are accepted in litigation before the secular courts as conclusive,
because the parties in interest made them so by contract or otherwise. Under
like circumstances, effect is given in the courts to the determination of the
judiciary bodies established by clubs and civil associations.

17 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17, ___ S.Ct. ___, 74 L.Ed.131,
18 137 (1929) (citing Watson v. Jones, 13 WALL 676, 20 L.Ed. 666 (___)).

19 This legal principle has been clearly adopted by the Washington State Supreme
20 Court, when addressing real property interests involving a hierarchal church. See,
21 Wilkerson v. Rector, etc., St. Luke Parish, 176 Wash. 377 (1934); See also, Church of
22 Christ v. Carder, 105 Wn.2d 204 (1986); Southside Tabernacle v. Church of God, 32 Wash.
23 App. 814 (1982) (All applying the compulsory deference rule established in Watson to
disputes involving church property.)

24 In this case, the identity of the Parish, the Parishioners, the Debtor, and their
25 relationship to their property rights are defined within Canon Law. These relationships, are
26 "purely ecclesiastical, though affecting civil rights, [and] are [to be] accepted in litigation

1 before secular courts as conclusive[.]” Gonzalez, 280 U.S. at 16, ___ S.Ct. at ___, 74 L.Ed.
2 at 137.

3 Within the Church, besides physical persons, there are also juridic persons, that is,
4 subjects in Canon Law of obligations and rights which correspond to their nature. (Canon
5 113(2)) A juridic person is an artificial person distinct from all natural persons or material
6 goods. Like a civil law corporation, it is a legal entity which can and must be conceived
7 apart from the natural persons who constitute it, administer it, or for whose benefit it exists.
8 See L. Chiappetta, *Il Codice di Diritto Canonico: Commento Giuridico-Pastorale*, 2nd ed.
9 (Rome: Dehoniane, 1996) 1:169; Robert Kennedy, *New Commentary on the Code of*
10 *Canon Law* (Paulist Press 2000).

11 Canon Law provides that:

12 A parish is a certain community of the Christian faithful stably constituted in a
13 particular church, whose pastoral care is entrusted to a pastor as its proper
14 pastor under the authority of a diocesan bishop. (Canon 515(1))

15 Canon 515(3) states:

16 A legitimately erected parish possesses juridic personality by the law itself.
17 (Canon 515(3))

18 In this case, there is no dispute that St. Aloysius is a legitimately erected Parish and
19 a juridic person under Canon Law.

20 Canon Law is clear that property acquired by a Parish belongs to the Parish.
21 Specifically, Canon 1256 states:

22 Under the supreme authority of the Roman Pontiff, ownership of goods
23 belongs to that juridic person which has acquired them legitimately. (Canon §
24 1256)

25 Since its inception, the Christian faithful themselves, which constitute the Parish,
26 have acquired both real and personal property which is used by the Christian faithful in their
fulfillment of their religious tenets. Under Canon Law, the property was acquired by, used
by, improved, maintained, and owned by each Parish independently. (Canons 1257-1272)
The juridic person (Parish) may not be deprived of its property without consent and
approval. (See Canons 1281–1288 and 1291-1295)

1 **3. Committee Waived Argument on Individual Parish Standing.**

2 The Committee's decision to name and sue St. Aloysius and 81 other Parishes
3 individually is evidence of the separate legal identity of each parish. Furthermore, the
4 Committee admits that St. Aloysius is a separate unincorporated association in its
5 Statement of undisputed Facts. (CSF No. 23) The doctrine of judicial estoppel prevents a
6 party from taking divergent positions in different legal proceedings. Wagner v. Proff
Engineers in California Court, 354 F.3d 1036, 1044 (9th Cir. 2004).

7 In addition, the request for relief in the Complaint seeks substantive consolidation of
8 St. Aloysius with the Debtor. Substantive consolidation in bankruptcy terms is the
9 consolidation of a non-debtor entity with a separate debtor entity. (See Alexander, 229
10 F.3d 750 (9th Cir. 2000)) As such, the Committee has already recognized the legal identity
11 of St. Aloysius is separate and apart from the Debtor. The Committee should be estopped
12 from taking a contrary position for purposes of its Motion.

13 **4. Judicial Estoppel Does Not Apply to St. Aloysius.**

14 St. Aloysius does not dispute the definition of judicial estoppel submitted by the
15 Committee which is designed to prevent a party from taking divergent positions in different
16 legal proceedings. See the Committee's Memorandum at p. 18, citing Wagner v. Prof.
Engineers in California Gov't, 354 F.3d 1036, 1044 (9th Cir. 2004). However, the
17 Committee fails to present a full recitation of the elements required for a finding of judicial
18 estoppel, and it is in those elements that the Committee's position is revealed to be flawed.

19 The United States Supreme Court recently listed three factors that
20 courts may consider in determining whether to apply the doctrine of judicial
21 estoppel:

22 First, a party's later position must be "clearly inconsistent" with its
23 earlier position. Second, courts regularly inquire whether the party has
24 succeeded in persuading a court to accept that party's earlier position, so that
25 judicial acceptance of an inconsistent position in a later proceeding would
26 create "the perception that either the first or the second court was misled[.]"
Absent success in a prior proceeding, a party's later inconsistent position
introduces no "risk of inconsistent court determinations," and thus no threat to
judicial integrity. A third consideration is whether the party seeking to assert

1 an inconsistent position would derive an unfair advantage or impose an unfair
2 detriment on the opposing party if not estopped. In enumerating these
3 factors, we do not establish inflexible prerequisites or an exhaustive formula
for determining the applicability of judicial estoppel. Additional considerations
may inform the doctrine's application in specific factual contexts.

4 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-783 (9th Cir. 2001), citing New
5 Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001) (internal citations omitted). The
6 application of judicial estoppel is appropriate to bar litigants from making incompatible
7 statements in two different cases. Risetto v. Plumbers & Steamers Local 343, 94 F.3d 597,
8 605 (9th Cir. 1996).

9 The position taken by St. Aloysius is not inconsistent with the holding of the cases
10 cited by the Committee. In Munns v. Martin, 131 Wn. 2d 192, 196 (1977) (*en banc*), the
11 case was actually filed by the individual members of St. Patrick's Parishioners and Friends
12 of Historic Preservation. Of the seven members, six were members of the Parish. *Id.* at
13 196. The issue arose when the "St. Patrick Building Committee," a parish committee,
14 applied for a demolition permit related to St. Patrick School. This was a case of historic
15 preservation interests vs. parish building committee interests, *Parishioner v. Parishioner*.
16 *Id.* at 194-199. The case holding invalidated a statute that was being used by a non-
17 parishioner in an attempt to stop a building project advanced by a parish building
committee for the furtherance of the Church's fundamental right to exercise religion. The
ordinance was found to have a coercive effect on the practice of religion.

18 The second case, Miller v. Catholic Bishop of Spokane, 2004 WL 2074328 (Wash.
19 App. 2004), is an unpublished decision. As a matter of law, this opinion should not have
20 been cited. "[U]npublished opinions of the Court of Appeals will not be considered in the
21 Court of Appeals and should not be considered in the trial courts. They do not become a
22 part of the common law of Washington." State v. Fitzpatrick, 5 Wn. App. 661, 668
(1971)(emphasis added).

23 Regardless, in Miller, the Catholic Bishop of Spokane was sued for damages based
24 upon the plaintiff's fall from a loft opening. The Bishop defended the action based on its
25 ownership of the property, which was the Parish Hall of Sacred Heart Catholic Church in
26 Springdale, Washington. However, this is not a position that is "clearly inconsistent" with

1 the current position taken by the Diocese and the Parishes. There is no assertion or
2 indication as to the nature of the Bishop's ownership interest. In this bankruptcy case, the
3 Diocese and the Parishes assert that the Diocese holds an ownership interest in the
4 property, but holds that interest in trust for the Parishes. This is not an inconsistent
5 position. Rather, the ownership status of the Bishop in Miller was never addressed or
6 litigated. Further, the Bishop did not "succeed in persuading a court to accept that party's
7 earlier position" because the **nature** of the Bishop's ownership interest was never at issue.
8 Therefore the current position, which is consistent with the prior position, introduces no risk
9 of inconsistent court determinations.

10 **5. The Committee's Reliance Upon F.E.L. Publication, Ltd. v. The Catholic**
11 **Bishop of Chicago and Oregon Case Law is Misplaced.**

12 First, both Oregon and Illinois apply a neutral principle of law approach to church
13 property issues. When examining church property disputes, Washington applies the more
14 stringent approach of compulsory deference. Furthermore, the legislative histories and
15 governing statutes concerning corporate soles is much different than that of Washington.

16 F.E.L Publications was a seventh circuit case which decided the issue on the legal
17 relationship between the Diocese and the Parishes within it in order to resolve a claim
18 against the diocese for tortious interference with a business relationship. There the Court
19 held that it was impossible for the cause of action to be based on the Diocese's directives
20 to the Parishes as those Parishes had no independent status, and were in fact "subsumed
21 under the Catholic Church." F.E.L., 754 F.2d at 221. In concluding this, the court relied
22 primarily upon Illinois case law, and in particular Haymes v. Catholic Bishop of Chicago, 41
23 Ill.2d 336 (1968), Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400 (1919)
24 and Galich v. Catholic Bishop of Chicago 75 Ill.App.3d 538 (1979). The case primarily
25 relied upon was Galich, however, that issue was not before the court in Galich.

26 In Galich, the Court held that the statute under which the Bishop of Chicago
incorporated did not create a statutory trust for the benefit of the Parishioners bringing the
case. Further, the Court held that any determination of the ability or inability of the Bishop
to demolish a church would violate the First Amendment.

1 The statute under which the case was decided was subsequently amended. As
2 amended, it includes a great deal of language indicating a legislative intent to create a trust
3 for the benefit of the religious congregation for whom the corporation is formed.

4 The other cases relied upon by the F.E.L. Court only support its conclusion by
5 inference. In Haymes, the Catholic Bishop of Chicago was named the defendant in a slip
6 and fall case at a Catholic school. While the issue was not addressed by the Court in
7 Haymes, the implication is that the Catholic school could not have been the proper
8 defendant. In Village of Palos Park, the Catholic Bishop of Chicago essentially challenged
9 the validity of a local zoning ordinance precluding the creation of a cemetery in the space
10 the Catholic Bishop wished to make one. Again, only by the inference that the Catholic
11 Bishop was the only party which could have brought the action does this case support the
12 conclusion reached by the F.E.L. Court.

13 **B. The Bankruptcy Estate Of The Diocese Does Not Have An Interest In The Real
14 Property At Issue.**

15 The Committee argues in its Complaint and subsequent Motion that by virtue of its
16 interpretation of law and facts that St. Aloysius' real and personal property is property of the
17 Debtor's bankruptcy estate. However, this argument is not substantiated. Section 541 of
18 the Bankruptcy Code specifically excludes from the estate property to which the Debtor
19 holds legal title, but has no equitable or beneficial interest. (See 11 U.S.C. § 541(b), (c),
20 and (d))

21 The concept of trust relationships, bare legal title, and beneficial/equitable ownership
22 of property is not new to bankruptcy courts. Courts have repeatedly held that when a debtor
23 holds mere legal title to property and a non-debtor holds the beneficial or equitable
24 ownership of that property, said property is not property of the estate. See Matter of
25 Torrez, 63 BR 751, 754-55 (9th Cir. BAP 1986)(imposition of resulting trust appropriate
26 since title was only put in children's name to avoid certain restrictions in a government
program); Sale of Guar. Corp, 220 BR 660, 664 (9th Cir. BAP 1998)(where the transferee of
property does not pay the purchase price for the property, the transferee is presumed to

1 hold the property in a resulting trust for the party who paid the consideration for its
2 purchase).

3 The standard of inquiry under section of the Bankruptcy Code excluding from
4 property of the estate trust interests that are subject to transfer restrictions enforceable
5 under applicable non-bankruptcy law, normally has three parts:

- 6 (1) whether the debtor has a beneficial interest in a trust;
- 7 (2) whether there is a restriction on the transfer of that interest; and
- 8 (3) whether the restriction is enforceable under non-bankruptcy law.

9 In re Wilcox, 233 F.3d 899 (6th Cir. 2000)

10 The evaluation of each element is resolved in accordance with and through the
11 application of state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d
12 136, 141-42 (1979).

13 Washington law clearly establishes that the Debtor holds only "bare legal title" to the
14 property in question. St. Aloysius is the true beneficial and equitable ownership of the real
15 property in dispute.

16 **1. St. Aloysius Parish Is The Beneficiary Of A Statutory Trust, Holding All
17 Equitable And Beneficial Interest In The Real Property.**

18 The corporation sole statute in Washington clearly and explicitly creates a statutory
19 trust comprised of the disputed property held for the benefit of the Church and its
20 parishioners. RCW Ch. 24.12. The Debtor incorporated under this chapter in 1915.

21 The legislative history is absolutely clear that the statute was enacted to create a
22 trust relationship. The bill, as introduced in the Senate by two Spokane Senators, was
23 entitled:

24 An Act providing for the organization of corporations sole, defining their
25 powers, authorizing them to transact business and hold property in trust for
26 religious denominations societies or churches.

27 S.B. 188 (Journal of Senate, 1915, p. 283) (emphasis added). After its introduction,
28 it was referred to the Senate Committee on Corporations other than Municipal. Id. After

1 review by the Committee, recommended that the bill be passed the Senate on March 6,
2 1915.

3 The bill was subsequently passed by the house on March 10, 1915, and was
4 approved by the Governor March 15, 1915.

5 The passed Senate Bill 188 became Session Law, Chapter 79. "Organizations and
6 Powers of Corporations Sole."

7 Section 3 specifically states:

8 Provided, all property held in such official capacity by such bishop,
9 overseer or presiding elder, as the case may be, shall be in trust for the use,
10 purpose, benefit, and behoof of his religious denomination, society or church.

11 S.B. 188 (Session Laws, 1915, Chapter 79, p. 254)

12 As a corporation sole, the Debtor has the power to contract, sue, and be sued in
13 court. R.C.W. § 24.12.020 (West 2005). A corporation sole also has the power to deal in
14 real and personal property in the same manner as any natural person. Id. This grant of
15 legal capacity is explicitly for the benefit of the trust created under this chapter. Id. The
16 trust is comprised of all the property held by the Debtor in its official capacity. RCW §
17 24.12.030 (West 2005). Specifically the statutes state:

18 All property held in such official capacity by such bishop, overseer or
19 presiding elder as the case may be, shall be in trust for the use, purpose,
20 benefit and behoof of his religious denomination, society or church.

21 RCW § 24.12.030 (West 2005).

22 Every corporation sole shall, for the purpose of the trust, have the power to
23 contract in the same manner and to the same extent as a natural person, and
24 may sue and be sued, and may defend in all courts and places, in all matters
25 and proceedings whatever, and shall have authority to borrow money and
26 give promissory notes therefor, and to secure the payment of the same by
mortgage or other lien upon property, real and personal, . . .

RCW § 24.12.020 (West 2005)(emphasis added). This statute defines the legal
relationship between the Debtor, St. Aloysius, and Parishioners as a relationship of trustee
and beneficiary. See, RCW § 24.12.030 (West 2005). This is also consistent with the
norms of Canon Law which provide that each parish is a Church capable of acquiring and
owning real and personal property interests.

1 Despite this clear statute and governing principles of Canon Law, the Committee
2 misconstrues Washington case law explicitly recognizing the restrictions existing on
3 property impressed with a trust by dedication to religious organizations for the benefit of
4 such organizations. In Wilkeson v. Rector, etc. St. Luke's Parish, 176 Wash. 377, 386
5 (1943), cited by the Committee, the Court explicitly notes that while the alienation of the
6 property in that case was within the power of the trustee, the use of the proceeds from the
7 sale could not be diverted from the benefit of the religious purposes for which the property
8 was donated. Wilkeson, 176 Wash. at 385. ("In passing, it may be conceded that, if the
9 purpose of respondents was to divert the funds to be received from the sale of the property
10 to other than religious purposes of the Episcopal Church, the court could and would enjoin
11 them. The trustee is merely the holder of the legal title.") Even the court's explicit holding,
12 quoted only in part by the Committee, recognizes that courts will ensure that property of a
13 trust which is held to benefit a religious society cannot lawfully be diverted from the purpose
14 for which the trust is held. Id. at 386. Specifically, the court stated: "For in a trust of the
15 character involved here, where no restraint is imposed on the right to alienate, the courts
16 will not interfere further than to see to it that the proceeds from the sale of the trust property
17 are not diverted from the use for religious purposes of the faith or denomination to which
18 the property was dedicated." Id. (emphasis added).

17 Despite the Committee's assertion that "[t]he corporation sole statute's 'trust' for the
18 Church is no different than the trust in Wilkeson ..." (Committee's Memo, p. 11) the
19 Committee disregards the court's explicit statements upholding restrictions on the use of
20 the trust res and its proceeds, and identifying that "[t]he trustee is merely the holder of the
21 legal title." Id. at 385. The Committee's memorandum repeatedly fails to distinguish
22 between the rights and obligations of a trustee as the legal title holder of property, and the
23 existence of an equitable interest in the property, attempting instead, to equate the holding
24 of legal title by the Catholic Bishop of Spokane with the absence of the existence of a trust.
25 This merely evidences a lack of recognition of the distinction between legal title and an
26 equitable interest, and does not support the Committee's argument that no trust exists.

25 The Catholic Bishop of Spokane is the trustee of the statutory trust created under
26 RCW chapter 24.12. Whether or not, as trustee, the Catholic Bishop of Spokane has the

1 power to alienate certain property of the trust, any such alienation must be for the "benefit
2 and behoof of his religious denomination, society or church." RCW § 24.12.030 (West
3 2005). With regard to "proceeds from the sale of the trust property," they "are not to be
4 diverted from the use for religious purposes of the faith or denomination." Wilkerson, 176
5 Wash. at 386. The statutory trust under which the property is held reserves the beneficial
6 use of the property for St. Aloysius.

7 2. **St. Aloysius Is The Beneficiary Of An Express Trust.**

8 The recognition and observance of the civil duties of a trustee have been impressed upon
9 the Debtor since its incorporation. The Catholic Bishop of Spokane was incorporated as a
10 corporation sole under the foregoing statute on July 3, 1915. With respect to St. Aloysius
11 Parish, this trust relationship commenced with the formation of the Parish. The Washington
12 Supreme Courts has noted that statements in articles of incorporation can be sufficient to
13 create an express trust. Hoffman v. Tieton View Methodist Church, 33 Wn.2d at 727
14 (1949) ("There is no question in our minds but that all property acquired by Tieton View
15 was, under article VIII of its articles of incorporation ... held in trust for the uses of the
16 Methodist Church...").

16 The articles of incorporation clearly express the intent of creating and maintaining a
17 trust for the benefit of the members of the Roman Catholic faith. Specifically, the articles
18 expressly provide:

19 ARTICLE III

20 This corporation is formed for the purpose of transacting business and
21 **holding property in trust** for that certain religious denomination or society
22 known as the Roman Catholic Church; to do business and contract in the
23 same manner and to the same extent as a natural person; to borrow money
24 and give promissory notes therefor, and to secure the payment of the same
25 by mortgage or other lien upon property real and personal; to buy, sell, lease,
26 mortgage, and in every way use and deal in real and personal property and to
receive bequests for its own use or upon trusts.

25 ARTICLE IV

26 The incorporator of this corporation is Augustine F. Schinner, who is the duly
appointed, qualified and acting Roman Catholic Bishop of the Diocese of

1 Spokane, in the state of Washington, and who as such Bishop of the Roman
2 Catholic Church has subscribed these Articles of Incorporation, in order to
3 become a corporation sole, together with his successors in office by his
4 official designation, in the manner prescribe in "An Act Providing for the
5 Organization of Corporations Sole, Defining Their Powers, **Authorizing them
6 to transact business and hold property in trust for religious
7 denominations, societies or churches.**" passed by the Legislature of the
8 State of Washington and approved by the Governor, March 15th, 1915.

9 ARTICLE V.

10 This incorporation is a religious corporation, not organized for gain and is
11 without capital stock, **all property held by it being in trust** for the use,
12 purpose, benefit and behoof of the Roman Catholic Church of the Diocese of
13 Spokane, in the State of Washington.

14 (Articles of Incorporation, 713115, Emphasis Added)

15 An express trust "arises because of the expressed intent and involves a fiduciary
16 relationship in which the trustee holds property for the benefit of a third party." Goodman v.
17 Goodman, 128 Wn.2d 366, 372 (1995). Ninety years ago, the Bishop of Spokane clearly
18 expressed the intent to hold property in trust for the benefit of the Parishes of the Church of
19 the Diocese of Spokane.

20 A trust will be found to exist if there is a clear manifestation of an intent to create a
21 trust; and the entire instrument, as well as its general purpose and scope, should be
22 considered, and the instrument should be construed in light of the circumstances
23 surrounding its execution. See, Hoffman v. Tieton View Meth. Ch., 33 Wn.2d 717, 726
24 (1949).

25 In this case, the trust instrument consists of the deed, which contains explicit
26 language referencing the fact title is held by a "Corporation Sole." The statute governing
corporation soles, RCW 24.12 et seq., clearly puts others on notice that a trust relationship
exists.

Just as use and occupancy of property is sufficient to place others on notice of the
possessor's interest, (Miebach v. Colasurdo, 102 Wn.2d 170, 173, 177 (1984)) and the
failure of a spouse to record an interest in community property does not preclude that
spouse from defending that interest in court, (Campbell v. Sandy, 190 Wash. 528, 531
(1937)), the use, improvement and maintenance by St. Aloysius of property recorded in the

1 name of a corporation sole, places the world on notice of the statutory trust under which it
2 is held, and identifies the true nature of the Debtor's interest in the property. Cf. In re
3 Country Club Market, 175 B.R. 1005, 1009 (D. Minn. 1994) (finding a valid statutory trust,
4 and noting that such a finding creates no burden on creditors "[a]s opposed to contractual
5 or implied trusts, the stature is public. There is no secret agreement between" the parties.).

6 **3. Statute Of Frauds Does Not Make The Express Trust In This Case**
7 **Defective.**

8 Generally, the statute of frauds will prevent parol evidence from enforcing the terms
9 of an oral trust absent fraud or other circumstances. In re Marriage of Lutz, 74 Wn. App.
10 356, 365 (1994). An exception to the requirement for an express trust over real property is
11 a situation where a beneficiary of the trust has partially performed in accordance with the
12 trust. Diel v. Beekman, 7 Wn. App. 139, 144 (1972), overruled on other grounds, Choplin v.
Sanders, 100 Wn.2d 853 (1984).

13 The standard for evaluating partial performance is whether the beneficiary, with the
14 consent of the trustee:

- 15 a. Enters into possession of the land,
- 16 b. Makes improvements to the land; and
- 17 c. Changes position in reliance of the trust.

18 See, Diel at 144-145.

19 As demonstrated in the Statement of Facts in this Memorandum (Section IV), St.
20 Aloysius and its parishioners have held possession of the property to the exclusion of all
21 others. St. Aloysius has made all improvements to the land and maintained the structures
22 thereon. All donations have been received with the understanding that St. Aloysius
23 improved the real property to fulfill religious tenets of the Parish. Such actions were taken
24 with the understanding the Church property was property belonging to St. Aloysius.
25
26

1 **C. The Committee Ignores Statutory Restriction On Institutional Funds.**

2 The Committee's discussion of the administrative dissolution of nonprofit
3 corporations is wholly irrelevant to the enforceability of the restrictions placed on property
4 donated to St. Aloysius under Washington law. This is not an instance of an administrative
5 dissolution by the state, but a reorganization under Title 11 of the United States Code.
6 Further, St. Aloysius is subject to the Uniform Management of Institutional Funds Act, RCW
7 Chapter 24.44, which provides only two methods for the release of a restriction placed on
8 donations. RCW § 24.44.060.

9 Under Washington law, donations given with restrictions as to their use, to
10 incorporated or **unincorporated organizations operated for religious**, educational, or
11 other eleemosynary purposes, can only be used in accordance with the restrictions unless
12 (1) the donor gives written consent releasing the restriction, or (2) an order is obtained in
13 Superior Court upon a finding that the restriction is (i) obsolete, (ii) inappropriate, or (iii)
14 impracticable. R.C.W. § 24.22.060. Further, the statute requires that the Attorney General
15 be given notice and opportunity to be heard on any such matter before the Superior Court
16 makes its findings, and expressly retains the application of the judicial doctrine of *cy pres*.
17 *Id.* Contrary to the claim's of the Committee, Washington's Legislature and Judiciary have
18 a long and well established tradition of honoring the intention of the donors and benefactors
19 of religious organizations.

20 The facts of this case demonstrate that the real property at issue was paid for with
21 donated funds, improved, and maintained with donated funds for the benefit of St. Aloysius.

22 **D. If The Court Concludes That A Statutory Trust Or An Express Trust Does Not**
23 **Exist, A Resulting Trust Should Be Found In Favor Of St. Aloysius.**

24 Even if the statutory and express trusts are found to be ineffective, the acquisition
25 the property in dispute clearly gives rise to a resulting trust. "It is well settled that where
26 property is taken in the name of a grantee other than the person advancing the
consideration, the one in whose name title is taken is a resulting trustee for the person who
paid the purchase price, in the absence of proof of a contrary intention." Mading v.
McPhaden, 50 Wn.2d 48, 53 (1957). "That grantee is presumed to hold legal title subject to

1 the equitable ownership of the person advancing the consideration." Stocker v. Stocker, 74
2 Wn. App. 1, 6 (1994) (quoting, Thor v. McDearmid, 63 Wn. App. 193, 206 (1991)).
3 "Similarly, where property is transferred to one person and the purchase price is advanced
4 by him as a loan to another, a resulting trust arises in the latter's favor." Mading, 50 Wn.2d
5 at 54. Resulting trusts are equitable in nature, and may be established by parole evidence
6 of a clear, cogent and convincing nature. Stocker, 74 Wn. App. at 6. As evidenced at
7 Section IV – Statement of Facts – all acquisitions of real and personal property, all
8 improvements, and all maintenance of the property was paid for with money directly
9 traceable to parishioners, for the benefit of Parishioners, with the clear understanding and
10 intent that it was for the benefit of Parish property. Just as in the case of Matter of Torrez,
11 63 BR 751, 754-755 (9th Cir. BAP 1986), the imposition of a resulting trust is appropriate
12 since title was placed in the name of the corporation sole with the understanding it was held
13 in trust for St. Aloysius. The Bishop never intended to actually own the property or assert
14 control over the property or improvements as exclusive owner.

14 **E. If The Diocese Is Forced To Breach Its Fiduciary Duty And Trust Relationship**
15 **owed to St. Aloysius, A Constructive Trust Must Be Imposed.**

16 The facts surrounding the nature of the relationship between the Debtor, St.
17 Aloysius, and the acquisition of the property establish a constructive trust for the benefit of
18 St. Aloysius. "A constructive trust is an equitable remedy which arises when the person
19 holding title to property has an equitable duty to convey it to another on the grounds that
20 they would be unjustly enriched if permitted to retain it." Lakewood v. Pierce County, 144
21 Wn.2d 118, 126 (2001). A constructive trust will be "imposed when there is clear, cogent
22 and convincing evidence of the basis for impressing the trust." Id. To establish a
23 constructive trust, a "party must show the trust arose from the relationship of the parties
24 involved, and that the property justly belongs to that party." Id. at 129. Here, the intent of
25 the parties was to create valid statutory and express trusts, the beneficial use of the
26 property was at all times held reserved by and for St. Aloysius. Not only is there clear,
cogent and convincing evidence for the imposition of a trust, but for the Court to hold that
the property in dispute belongs to the Debtor would unjustly enrich the Debtor to the

1 detriment of St. Aloysius who has relied on its ownership of the property since the parish
2 was founded.

3
4 **F. The Committee's Catch All Argument Of "Alter Ego" Fails As A Matter Of Law
And Fact.**

5 The "Alter Ego" theory advanced by the Committee is merely a disguised attempt to
6 circumvent legal deficiencies in its third claim for relief of substantive consolidation. In this
7 case, the Committee is asking the Court to rule that St. Aloysius is liable for the debts of the
8 Debtor, a corporation sole, even though St. Aloysius is a separate legal entity and is clearly
9 not a "shareholder" of the Debtor.

10 When Washington Courts invoke "piercing the corporate veil", they have applied the
11 "doctrine of corporate disregard" based upon two elements:

- 12 a. "The corporate form must be intentionally used to violate or evade a duty,"
13 and
14 b. "Disregard must be necessary and required to prevent unjustified loss to the
injured party."

15 See, Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d
16 689 (1982)

17 The first factor requires a showing of abuse of the corporate form, typically involving
18 fraud, misrepresentation, or other action **by the corporation that harms the creditor and
benefits the shareholder.** The second factor requires that the harm must actually occur.
19 In this case, the Committee has neither plead nor demonstrated any facts to support both
20 requirements of an "Alter Ego Claim."

21 The undisputed facts offered by St. Aloysius demonstrate a claim of "Alter Ego" is
22 without merit. (See Statement of Facts, Section IV)

23 **1. The Committee Attempts To Circumvent Statutory Prohibitions Against
24 Substantive Consolidation Of A Not "Moneyed" Entity.**

25 The Committee's Complaint, in its third cause of action, seeks a declaratory order for
26 substantive consolidation "all Diocese Related Entities." The Committee's Motion for

1 Summary Judgment now seeks a declaratory order under a theory of "Alter Ego." Such a
2 legal theory is nothing more than a thinly veiled attempt to place St. Aloysius and other
3 non-debtor/non-moneyed religious entities into an involuntary bankruptcy. Relief which is
4 forbidden by the Code. See, 11 U.S.C. § 303(a) and corresponding legislative history.
5 House Report No. 95-595, 95th Cong., 1st Sess 321 (1977).

6 The Bankruptcy Code clearly recognizes that not all debtors are the same. And
7 while Chapter 11 and its provisions do not generally distinguish between for-profit, non-
8 profit, and religious organizations for the purposes of reorganization, that is not to say that
9 a distinction does not exist and should not or cannot be made. For example, under the
10 Bankruptcy Code non-profit corporations are treated more favorably than for-profit
11 organizations. See, e.g., 11 U.S.C. § 303(a) (excluding non-profit organizations from
12 involuntary bankruptcy); 11 U.S.C. § 1112(c) (forbidding a court from converting a case
13 filed by a non-profit from Chapter 11 to Chapter 7 without consent). Congress has
14 recognized that religious organizations present unique bankruptcy issues because
15 government regulation of religion implicates First Amendment rights. For example, the
16 Bankruptcy Code has been modified by Congress to protect free exercise of religion to
17 prevent a trustee from avoiding a debtor's donation given to a religious or charitable
18 organization. See Religious Liberty and Charitable Donation Protection Act of 1998, Pub.
19 L. No. 105-183, 112 Stat. 517 (1998).

20 Substantive consolidation has no express statutory basis, but rather, is a "product of
21 judicial gloss." In re Augie/Restiro Bakery Co. Lt., 860 F.2d 515, 518 (2nd Cir. 1988).
22 Substantive consolidation results in pooling the assets of, and claims against, the two
23 entities, satisfying liabilities from the resultant common fund; eliminating inter company
24 claims; and combining creditors of the two companies for purposes of voting on
25 reorganization plans. In re Bonham, 229 F.3d 750, 764 (9th Cir. 2000).

26 In the present case, even if the Committee could get around the statutory
prohibitions, the Committee would have to demonstrate 1) that the Committee or its
members dealt with St. Aloysius Parish and the Debtor as a single economic unit and did
not rely on the separate credit of each of the entities; or that the operations of the Debtor

1 and St. Aloysius Parish were **excessively** entangled with the Debtor's affairs to the extent
2 that consolidation will benefit all creditors. See In re Bonham, 229 F.3d 750, 766 (9th Cir.).

3 The newly surfaced "Alter Ego" theory is nothing more than a recognition that
4 Committee's third cause of action has no application in this case.

5 **G. Subjecting The Parish To Declaratory Relief of this Nature Violates First**
6 **Amendment Rights Of Free Exercise And The Religious Freedom Restoration**
7 **Act.**

8 The exercise of religion includes the "right to believe and profess whatever religious
9 doctrine one desires" and prevents the government from "lendi[ng] its power to one side or
10 another in controversies over religious authority or dogma." See Smith, 494 U.S. at 877
11 (citations omitted). To protect the exercise of religion, the Supreme Court has held that if
12 the government "substantially burdens" a person's exercise of religion, and the government
13 does not demonstrate that it has a "compelling government interest" to justify the religious
14 burden, then the government intrusion into a person's free exercise of religion has been
15 violated. See Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, this Court later
16 limited Sherbert by holding that "the right of free exercise does not relieve an individual of
17 the obligation to comply with a 'valid and neutral law of general applicability . . .'" See
18 Smith, 494 U.S. at 879 (citations omitted). Public opposition to the Smith holding was
19 immediate and forceful. Congress enacted the Religious Freedom Restoration Act, 42
20 U.S.C. § 2000bb-1 (1993)(hereinafter, RFRA), "to restore the compelling interest test as set
21 forth in Sherbert," and "to guarantee its application in all cases where free exercise of
22 religion is substantially burdened," including cases in which the law at issue was of "general
23 applicability." See 42 U.S.C. § 2000bb(b)(1), (2). In Boerne v. Flores, 521 U.S. 507
24 (1997), the Supreme Court declared RFRA unconstitutional as applied to state actions
25 because Congress had exceeded the scope of its power under Section 5 of the Fourteenth
26 Amendment in enacting the law. See Boerne, 521 U.S. at 527 (RFRA "intruded into an
area reserved by the Constitution to the States"). However, RFRA continues to be
constitutional as applied to federal law.

1 Under RFRA, a neutral law of general applicability is an unconstitutional
2 infringement of a person's free exercise rights if the following is true (1) the law
3 substantially burdens a person's exercise of religion; (2) the government cannot justify the
4 law with a compelling government interest; and (3) there are no less restrictive means of
5 furthering the government's compelling interest. 42 U.S.C. § 2000bb-1(a), (b).

6 Two unique circumstances arise would occur if the Court were to dictate the
7 ownership and use of Parish property: (1) a religious leader will have been replaced by a
8 government official as the head of a religious organization, resulting in comprehensive
9 government surveillance of religion; and (2) a government official will be in an
10 unprecedented position of decision making power over a church/Parish, a position
11 traditionally given only to a spiritually mandated leader, the Pastor of the Parish, resulting in
12 the appearance of government endorsement of religion for the benefit of a creditor's
13 committee.

14 St. Aloysius' economic interests cannot be separated from its spiritual interest – any
15 economic decision the Court makes regarding use or ownership of property inevitably has
16 direct and significant religious consequences. Thus, the Court will become hopelessly
17 entangled with religious policy of the Catholic Church. The effect of St. Aloysius' spiritual
18 mission is that every financial decision it makes is driven by religious objectives toward
19 religious ends in accordance with Canon Law. This creates an irreconcilable church versus
20 state conflict between a non-debtor, a creditors committee, and the Court. By effectively
21 forcing a Parish into bankruptcy by way of declaratory relief, the government is changing
22 the essential structure of St. Aloysius under Canon Law. Since the Canon directs the
23 religious vision and thus the financial objectives of St. Aloysius, such a change would
24 essentially allow government to determine who benefits from St. Aloysius' mission.

25 VII.

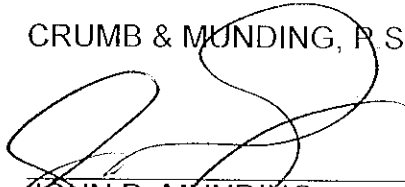
26 CONCLUSION

As a matter of law, the Committee has not established a case in controversy with St.
Aloysius that would permit the declaratory relief requested. Even if the Court were to
consider the pending motion for summary judgment based upon the Committee's factual

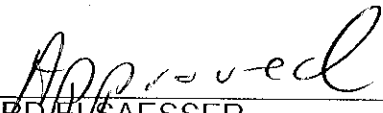
1 theory, the Committee's motion fails as the Committee has failed to eliminate material
2 questions of fact as to St. Aloysius' ownership interest in the real property, including
3 furnishing all consideration for purchase, improvements, and maintenance.

4 DATED this 26th day of May, 2005.

5 CRUMB & MUNDING, P.S.

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8 JOHN D. MUNDING
WSBA #21734

9 ELSAESSER JARZABEK ANDERSON
10 MARKS ELLIOTT & MCHUGH

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12 FORD/ELSAESSER
13 BARRY MCHUGH
Attorneys for Defendant Parishes

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